

§ 1.409(p)-1

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not be treated as the grant of a new stock right under § 1.409A-1(b)(5)(v)(A), and would not result in the stock right being treated as having had a deferral feature from the date of grant pursuant to § 1.409A-1(b)(5)(v)(C).

(vi) *Rescission of modifications.* Any modification to the terms of a plan that would inadvertently result in treatment as a material modification under this section is not considered a material modification of the plan to the extent the modification in the terms of the plan is rescinded by the earlier of a date before the right is exercised (if the change grants a discretionary right) or the last day of the taxable year of the service provider during which such change occurred. Thus, for example, if a service recipient modifies the terms of a plan on March 1 to allow an individual employee to elect a new change in the time or form of payment without realizing that such a change constituted a material modification that would subject the plan to the requirements of section 409A, and the modification is rescinded on November 1, then if no change in the time or form of payment has been made pursuant to the modification before November 1, the plan is not considered materially modified under this section.

(vii) *Definition of plan.* For purposes of this paragraph (a)(4), the term “plan” has the same meaning provided in § 1.409A-1(c), except that the plan aggregation rules of § 1.409A-1(c)(2) do not apply.

(b) *Regulatory applicability date.* § 1.409A-1, § 1.409A-2, § 1.409A-3 and this section are applicable for taxable years beginning on or after January 1, 2008.

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§ 1.409(p)-1 Prohibited allocation of securities in an S corporation.

(a) *Organization of this section and definition—(1) Organization of this section.* Section 409(p) applies if a nonallocation year occurs in an ESOP that holds shares of stock of an S corporation that are employer securities. Paragraph (b) of this section sets forth the general rule under section 409(p)(1) and (2) prohibiting any accrual or alloca-

tion to a disqualified person in a non-allocation year. Paragraph (c) of this section sets forth rules under section 409(p)(3), (5), and (7) for determining whether a year is a nonallocation year, generally based on whether disqualified persons own at least 50 percent of the shares of the S corporation, either taking into account only the outstanding shares of the S corporation (including shares held by the ESOP) or taking into account both the outstanding shares and synthetic equity of the S corporation. Paragraphs (d), (e), and (f) of this section contain definitions of disqualified person under section 409(p)(4) and (5), deemed-owned ESOP shares under section 409(p)(4)(C), and synthetic equity under section 409(p)(6)(C). Paragraph (g) of this section contains a standard for determining when the principal purpose of the ownership structure of an S corporation constitutes an avoidance or evasion of section 409(p).

(2) *Definitions.* The following definitions apply for purposes of section 409(p) and this section, as well as for purposes of section 4979A, which imposes an excise tax on certain events.

(i) *Deemed-owned ESOP shares* has the meaning set forth in paragraph (e) of this section.

(ii) *Disqualified person* has the meaning set forth in paragraph (d) of this section.

(iii) *Employer* has the meaning set forth in § 1.410(b)-9.

(iv) *Employer securities* means employer securities within the meaning of section 409(1).

(v) *ESOP* means an employee stock ownership plan within the meaning of section 4975(e)(7).

(vi) *Prohibited allocation* has the meaning set forth in paragraph (b)(2) of this section.

(vii) *S corporation* means S corporation within the meaning of section 1361.

(viii) *Synthetic equity* has the meaning set forth in paragraph (f) of this section.

(b) *Prohibited allocation in a nonallocation year—(1) General rule.* Section 409(p)(1) provides that an ESOP holding employer securities consisting of stock in an S corporation must provide that

no portion of the assets of the plan attributable to (or allocable in lieu of) such employer securities may, during a nonallocation year, accrue under the ESOP, or be allocated directly or indirectly under any plan of the employer (including the ESOP) meeting the requirements of section 401(a), for the benefit of any disqualified person.

(2) *Additional rules*—(i) *Prohibited allocation definition*. For purposes of section 409(p) and this section, a *prohibited allocation* means an impermissible accrual or an impermissible allocation. Whether there is impermissible accrual is determined under paragraph (b)(2)(ii) of this section and whether there is an impermissible allocation is determined under paragraph (b)(2)(iii) of this section. The amount of the prohibited allocation is equal to the sum of the amount of the impermissible accrual plus the amount of the impermissible allocation.

(ii) *Impermissible accrual*. There is an impermissible accrual to the extent that employer securities consisting of stock in an S corporation owned by the ESOP and any assets attributable thereto are held under the ESOP for the benefit of a disqualified person during a nonallocation year. For this purpose, assets attributable to stock in an S corporation owned by an ESOP include any distributions, within the meaning of section 1368, made on S corporation stock held in a disqualified person's account in the ESOP (including earnings thereon), plus any proceeds from the sale of S corporation securities held for a disqualified person's account in the ESOP (including any earnings thereon). Thus, in the event of a nonallocation year, all S corporation shares and all other ESOP assets attributable to S corporation stock, including distributions, sales proceeds, and earnings on either distributions or proceeds, held for the account of such disqualified person in the ESOP during that year are an impermissible accrual for the benefit of that person, whether attributable to contributions in the current year or in prior years.

(iii) *Impermissible allocation*. An impermissible allocation occurs during a nonallocation year to the extent that a contribution or other annual addition (within the meaning of section

415(c)(2)) is made with respect to the account of a disqualified person, or the disqualified person otherwise accrues additional benefits, directly or indirectly under the ESOP or any other plan of the employer qualified under section 401(a) (including a release and allocation of assets from a suspense account, as described at § 54.4975-11(c) and (d) of this chapter) that, for the nonallocation year, would have been added to the account of the disqualified person under the ESOP and invested in employer securities consisting of stock in an S corporation owned by the ESOP but for a provision in the ESOP that precludes such addition to the account of the disqualified person, and investment in employer securities during a nonallocation year.

(iv) *Effects of prohibited allocation*—(A) *Deemed distribution*. If a plan year is a nonallocation year, the amount of any prohibited allocation in the account of a disqualified person as of the first day of the plan year, as determined under this paragraph (b)(2), is treated as distributed from the ESOP (or other plan of the employer) to the disqualified person on the first day of the plan year. In the case of an impermissible accrual or impermissible allocation that is not in the account of the disqualified person as of the first day of the plan year, the amount of the prohibited allocation, as determined under this paragraph (b)(2), is treated as distributed on the date of the prohibited allocation. Thus, the fair market value of assets in the disqualified person's account that constitutes an impermissible accrual or allocation is included in gross income (to the extent in excess of any investment in the contract allocable to such amount) and is subject to any additional income tax that applies under section 72(t). A deemed distribution under this paragraph (b)(2)(iv)(A) is not an actual distribution from the ESOP. Thus, the amount of the prohibited allocation is not an eligible rollover distribution under section 402(c). However, for purposes of applying sections 72 and 402 with respect to any subsequent distribution from the ESOP, the amount that the disqualified person previously took into account as income as a result of the

deemed distribution is treated as investment in the contract.

(B) *Other effects.* If there is a prohibited allocation, then the plan fails to satisfy the requirements of section 4975(e)(7) and ceases to be an ESOP. In such a case, the exemption from the excise tax on prohibited transactions for loans to leveraged ESOPs contained in section 4975(d)(3) would cease to apply to any loan (with the result that the employer would owe an excise tax with respect to the previously exempt loan). As a result of these failures, the plan would lose the prohibited transaction exemption for loans to an ESOP under section 4975(d)(3) of the Code and section 408(b)(3) of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Finally, a plan that does not operate in accordance with its terms to reflect section 409(p) fails to satisfy the qualification requirements of section 401(a), which would cause the corporation's S election to terminate under section 1362. See also section 4979A(a) which imposes an excise tax in certain events, including a prohibited allocation under section 409(p).

(C) *Example.* The rules of this paragraph (b)(2)(iv) are illustrated by the following example:

Example. (i) *Facts.* Corporation M, an S corporation under section 1361, establishes Plan P as an ESOP in 2006, with a calendar plan year. Plan P is a qualified plan that includes terms providing that a prohibited allocation will not occur during a nonallocation year in accordance with section 409(p). On December 31, 2006, all of the 1,000 outstanding shares of stock of Corporation M, with a fair market value of \$30 per share, are contributed to Plan P and allocated among accounts established within Plan P for the benefit of Corporation M's three employees, individuals A, B, and C, based on their compensation for 2006. As a result, on December 31, 2006, participant A's account includes 800 of the shares (\$24,000); participant B's account includes 140 of the shares (\$4,200); and participant C's account includes the remaining 60 shares (\$1,800). The plan year 2006 is a nonallocation year, participants A and B are disqualified persons on December 31, 2006, and a prohibited allocation occurs for A and B on December 31, 2006.

(ii) *Conclusion.* On December 31, 2006, participants A and B each have a deemed distribution as a result of the prohibited allocation, resulting in income of \$24,000 for participant A and \$4,200 for participant B. Corpora-

tion M owes an excise tax under section 4979A, based on an amount involved of \$28,200. Plan P ceases to be an ESOP on the date of the prohibited allocation (December 31, 2006) and also fails to satisfy the qualification requirements of section 401(a) on that date due to the failure to comply with the provisions requiring compliance with section 409(p). As a result of having an ineligible shareholder under section 1361(b)(1)(B), Corporation M ceases to be an S corporation under section 1361 on December 31, 2006.

(v) *Prevention of prohibited allocation—*

(A) *Transfer of account to non-ESOP.* An ESOP may prevent a nonallocation year or a prohibited allocation during a nonallocation year by providing for assets (including S corporation securities) allocated to the account of a disqualified person (or a person reasonably expected to become a disqualified person absent a transfer described in this paragraph (b)(2)(v)(A)) to be transferred into a separate portion of the plan that is not an ESOP, as described in § 54.4975-11(a)(5) of this chapter, or to another plan of the employer that satisfies the requirements of section 401(a) and that is not an ESOP. Any such transfer must be effectuated by an affirmative action taken no later than the date of the transfer, and all subsequent actions (including benefit statements) generally must be consistent with the transfer having occurred on that date. In the event of such a transfer involving S corporation securities, the recipient plan is subject to tax on unrelated business taxable income under section 512.

(B) *Relief from nondiscrimination requirement.* Pursuant to this paragraph (b)(2)(v)(B), if a transfer described in paragraph (b)(2)(v)(A) of this section is made from an ESOP to a separate portion of the plan or to another qualified plan of the employer that is not an ESOP, then both the ESOP and the plan or portion of a plan that is not an ESOP do not fail to satisfy the requirements of § 1.401(a)(4)-4 merely because of the transfer. Further, subsequent to the transfer, that plan will not fail to satisfy the requirements of § 1.401(a)(4)-4 merely because of the benefits, rights, and features with respect to the transferred benefits if those benefits, rights, and features would satisfy the requirements of § 1.401(a)(4)-4 if the

mandatory disaggregation rule for ESOPs at § 1.410(b)-7(c)(2) did not apply.

(c) *Nonallocation year.* A year is a nonallocation year if it is described in the general definition in paragraph (c)(1) of this section or if the special rule of paragraph (c)(3) of this section applies.

(1) *General definition.* For purposes of section 409(p) and this section, a *nonallocation year* means a plan year of an ESOP during which, at any time, the ESOP holds any employer securities that are shares of an S corporation and either—

(i) Disqualified persons own at least 50 percent of the number of outstanding shares of stock in the S corporation (including deemed-owned ESOP shares); or

(ii) Disqualified persons own at least 50 percent of the sum of:

(A) The outstanding shares of stock in the S corporation (including deemed-owned ESOP shares); and

(B) The shares of synthetic equity in the S corporation owned by disqualified persons.

(2) *Attribution rules.* For purposes of this paragraph (c), the rules of section 318(a) apply to determine ownership of shares in the S corporation (including deemed-owned ESOP shares) and synthetic equity. However, for this purpose, section 318(a)(4) (relating to options to acquire stock) is disregarded and, in applying section 318(a)(1), the members of an individual's family include members of the individual's family under paragraph (d)(2) of this section. In addition, an individual is treated as owning deemed-owned ESOP shares of that individual notwithstanding the employee trust exception in section 318(a)(2)(B)(i). If the attribution rules in paragraph (f)(1) of this section apply, then the rules of paragraph (f)(1) of this section are applied before (and in addition to) the rules of this paragraph (c)(2).

(3) *Special rule for avoidance or evasion.* (i) Any ownership structure described in paragraph (g)(3) of this section results in a nonallocation year. In addition, each individual referred to in paragraph (g)(3) of this section is treated as a disqualified person and the individual's interest in the separate entity

described in paragraph (g)(3) of this section is treated as synthetic equity.

(ii) Pursuant to section 409(p)(7)(B), the Commissioner, in revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b) of this chapter), may provide that a nonallocation year occurs in any case in which the principal purpose of the ownership structure of an S corporation constitutes an avoidance or evasion of section 409(p). For any year that is a nonallocation year under this paragraph (c)(3), the Commissioner may treat any person as a disqualified person. See paragraph (g) of this section for guidance regarding when the principal purpose of an ownership structure of an S corporation involving synthetic equity constitutes an avoidance or evasion of section 409(p).

(4) *Special rule for certain stock rights.* (i) For purposes of paragraph (c)(1) of this section, a person is treated as owning stock if the person has an exercisable right to acquire the stock, the stock is both issued and outstanding, and the stock is held by persons other than the ESOP, the S corporation, or a related entity (as defined in paragraph (f)(3) of this section).

(ii) This paragraph (c)(4) applies only if treating persons as owning the shares described in paragraph (c)(4)(i) of this section results in a nonallocation year. This paragraph (c)(4) does not apply to a right to acquire stock of an S corporation held by a shareholder that is subject to Federal income tax that, under § 1.1361-1(l)(2)(iii)(A) or (l)(4)(iii)(C), would not be taken into account in determining if an S corporation has a second class of stock, provided that a principal purpose of the right is not the avoidance or evasion of section 409(p). Under the last sentence of paragraph (f)(2)(i) of this section, this paragraph (c)(4)(ii) does not apply for purposes of determining ownership of deemed-owned ESOP shares or whether an interest constitutes synthetic equity.

(5) *Application with respect to shares treated as owned by more than one person.* For purposes of applying paragraph (c)(1) of this section, if, by application of the rules of paragraph (c)(2), (c)(4), or (f)(1) of this section, any share is treated as owned by more than one

person, then that share is counted as a single share and that share is treated as owned by disqualified persons if any of the owners is a disqualified person.

(6) *Effect of nonallocation year.* See paragraph (b) of this section for a prohibition applicable during a nonallocation year. See also section 4979A for an excise tax applicable in certain cases, including section 4979A(a)(3) and (4) which applies during a nonallocation year (whether or not there is a prohibited allocation during the year).

(d) *Disqualified persons.* A person is a disqualified person if the person is described in paragraph (d)(1), (d)(2), or (d)(3) of this section.

(1) *General definition.* For purposes of section 409(p) and this section, a *disqualified person* means any person for whom—

(i) The number of such person's deemed-owned ESOP shares of the S corporation is at least 10 percent of the number of the deemed-owned ESOP shares of the S corporation;

(ii) The aggregate number of such person's deemed-owned ESOP shares and synthetic equity shares of the S corporation is at least 10 percent of the sum of—

(A) The total number of deemed-owned ESOP shares of the S corporation; and

(B) The person's synthetic equity shares of the S corporation;

(iii) The aggregate number of the S corporation's deemed-owned ESOP shares of such person and of the members of such person's family is at least 20 percent of the number of deemed-owned ESOP shares of the S corporation; or

(iv) The aggregate number of the S corporation's deemed-owned ESOP shares and synthetic equity shares of such person and of the members of such person's family is at least 20 percent of the sum of—

(A) The total number of deemed-owned ESOP shares of the S corporation; and

(B) The synthetic equity shares of the S corporation owned by such person and the members of such person's family.

(2) *Treatment of family members; definition—(i) Rule.* Each member of the family of any person who is a disqualified

person under paragraph (d)(1)(iii) or (iv) of this section and who owns any deemed-owned ESOP shares or synthetic equity shares is a disqualified person.

(ii) *General definition.* For purposes of section 409(p) and this section, *member of the family* means, with respect to an individual—

(A) The spouse of the individual;

(B) An ancestor or lineal descendant of the individual or the individual's spouse;

(C) A brother or sister of the individual or of the individual's spouse and any lineal descendant of the brother or sister; and

(D) The spouse of any individual described in paragraph (d)(2)(ii)(B) or (C) of this section.

(iii) *Spouse.* A spouse of an individual who is legally separated from such individual under a decree of divorce or separate maintenance is not treated as such individual's spouse under paragraph (d)(2)(ii) of this section.

(3) *Special rule for certain nonallocation years.* See paragraph (c)(3) of this section (relating to avoidance or evasion of section 409(p)) for special rules under which certain persons are treated as disqualified persons.

(4) *Example.* The rules of this paragraph (d) are illustrated by the following examples:

Example 1. (i) *Facts.* An S corporation has 800 outstanding shares, of which 100 are owned by individual O and 700 are held in an employee stock ownership plan (ESOP) during 2006, including 200 shares held in the ESOP account of O, 65 shares held in the ESOP account of participant P, 65 shares held in the ESOP account of participant Q who is P's spouse, and 14 shares held in the ESOP account of R, who is the daughter of P and Q. There are no unallocated suspense account shares in the ESOP. The S corporation has no synthetic equity.

(ii) *Conclusion.* Under paragraph (d)(1)(i) of this section, O is a disqualified person during 2006 because O's account in the ESOP holds at least 10% of the shares owned by the ESOP (200 is 28.6% of 700). During 2006, neither P, Q, nor R is a disqualified person under paragraph (d)(1)(i) of this section, because each of their accounts holds less than 10% of the shares owned by the ESOP. However, each of P, Q, and R is a disqualified person under paragraph (d)(1)(iii) of this section because P and members of P's family own at least 20% of the deemed-owned ESOP shares (144 (the sum of 65, 65 and 14) is 20.6% of 700).

As a result, disqualified persons own at least 50% of the outstanding shares of the S corporation during 2006 (O's 100 directly owned shares, O's 200 deemed-owned shares, P's 65 deemed-owned shares, Q's 65 deemed-owned shares, and R's 14 deemed-owned shares are 55.5% of 800).

Example 2. (i) *Facts.* An S corporation has shares that are owned by an ESOP and various individuals. Individuals S and T are married and have a son, U. Individuals V and W are married and have a daughter, X. Individuals U and X are married. Individual V has a brother Y. Their percentages of the deemed-owned ESOP shares of the S corporation are as follows: T has 6%; U has 7%; and V has 8%. Neither S, W, X, nor Y has any deemed-owned ESOP shares and the S corporation has no synthetic equity. However, individual S and individual Y each own directly a number of shares of the outstanding shares of the S corporation.

(ii) *Conclusion.* In this example, individual U is a disqualified person under paragraph (d)(1) of this section (because U's family consists of S, T, U, V, W, and X, and, in the aggregate, those persons own more than 20% of the deemed-owned ESOP shares) and individual X is also a disqualified person under paragraph (d)(1) of this section (because T's family consists of S, T, U, V, W, and X, and, in the aggregate, those persons own more than 20% of the deemed-owned ESOP shares). Further, individuals T and V are each a disqualified person under paragraph (d)(2) of this section because each is a member of a family that includes one or more disqualified persons and each has deemed-owned ESOP shares. However, individuals S, W, and Y are not disqualified persons under this paragraph (d). For example, S does not own more than 10% of the deemed-owned ESOP shares, and S's family, which consists of S, T, U, and X, owns, in the aggregate, only 13% of the deemed-owned ESOP shares (X's parents are not members of S's family because the family members of a person do not include the parents-in-law of the person's descendants). Further, note that, for purposes of determining whether the ESOP has a nonallocation year under paragraph (c) of this section, the shares directly owned by S and Y would be taken into account as shares owned by disqualified persons under the attribution rules in paragraph (c)(2) of this section.

(e) *Deemed-owned ESOP shares.* For purposes of section 409(p) and this section, a person is treated as owning his or her deemed-owned ESOP shares. Deemed-owned ESOP shares owned by a person mean, with respect to any person—

(1) Any shares of stock in the S corporation constituting employer securi-

ties that are allocated to such person's account under the ESOP; and

(2) Such person's share of the stock in the S corporation that is held by the ESOP but is not allocated to the account of any participant or beneficiary (with such person's share to be determined in the same proportion as the shares released and allocated from a suspense account, as described at § 54.4975-11(c) and (d) of the Excise Tax Regulations, under the ESOP for the most recently ended plan year for which there were shares released and allocated from a suspense account, or if there has been no such prior release and allocation from a suspense account, then determined in proportion to a reasonable estimate of the shares that would be released and allocated in the first year of a loan repayment).

(f) *Synthetic equity and rights to acquire stock of the S corporation*—(1) *Ownership of synthetic equity.* For purposes of section 409(p) and this section, synthetic equity means the rights described in paragraph (f)(2) of this section. Synthetic equity is treated as owned by the person that has any of the rights specified in paragraph (f)(2) of the section. In addition, the attribution rules as set forth in paragraph (c)(2) of this section apply for purposes of attributing ownership of synthetic equity.

(2) *Synthetic equity*—(i) *Rights to acquire stock of the S corporation*—(A) *General rule.* Synthetic equity includes any stock option, warrant, restricted stock, deferred issuance stock right, stock appreciation right payable in stock, or similar interest or right that gives the holder the right to acquire or receive stock of the S corporation in the future. Rights to acquire stock in an S corporation with respect to stock that is, at all times during the period when such rights are effective, both issued and outstanding, and held by a person other than the ESOP, the S corporation, or a related entity are not synthetic equity but only if that person is subject to federal income taxes. (See also paragraph (c)(4) of this section.)

(B) *Exception for certain rights of first refusal.* A right of first refusal to acquire stock held by an ESOP is not treated as a right to acquire stock of an S corporation under this paragraph

if the right to acquire stock would not be taken into account under § 1.1361-1(1)(2)(iii)(A) in determining if an S corporation has a second class of stock and the price at which the stock is acquired under the right of first refusal is not less than the price determined under section 409(h). See § 54.4975-11(d)(5) of the Excise Tax Regulations. The right of first refusal must also comply with the requirements of § 54.4975-7(b)(9) of the Excise Tax Regulations. This paragraph (f)(2)(i)(B) does not apply if, based on the facts and circumstances, the Commissioner finds that the right to acquire stock held by the ESOP constitutes an avoidance or an evasion of section 409(p). See also section 408(d) of ERISA, under which the exemption provided by section 408(e) of ERISA (and the related exemption at section 4975(d)(13) of the Code) does not apply to an owner-employee, including an employee or officer of an S corporation who is a 5 percent owner.

(ii) *Special rule for certain stock rights.* Synthetic equity also includes a right to a future payment (payable in cash or any other form other than stock of the S corporation) from an S corporation that is based on the value of the stock of the S corporation, such as appreciation in such value. Thus, for example, synthetic equity includes a stock appreciation right with respect to stock of an S corporation that is payable in cash or a phantom stock unit with respect to stock of an S corporation that is payable in cash.

(iii) *Rights to acquire interests in or assets of an S corporation or a related entity.* Synthetic equity includes a right to acquire stock or other similar interests in a related entity to the extent of the S corporation's ownership. Synthetic equity also includes a right to acquire assets of an S corporation or a related entity other than either rights to acquire goods, services, or property at fair market value in the ordinary course of business or fringe benefits excluded from gross income under section 132.

(iv) *Special rule for nonqualified deferred compensation.* (A) Synthetic equity also includes any of the following with respect to an S corporation or a related entity: any remuneration to which section 404(a)(5) applies; remuneration for which a deduction would be permitted under section 404(a)(5) if separate accounts were maintained; any right to receive property, as defined in § 1.83-3(e) of the Income Tax Regulations (including a payment to a trust described in section 402(b) or to an annuity described in section 403(c)) in a future year for the performance of services; any transfer of property in connection with the performance of services to which section 83 applies to the extent that the property is not substantially vested within the meaning of § 1.83-3(i) by the end of the plan year in which transferred; and a split-dollar life insurance arrangement under § 1.61-22(b) entered into in connection with the performance of services (other than one under which, at all times, the only economic benefit that will be provided under the arrangement is current life insurance protection as described in § 1.61-22(d)(3)). Synthetic equity also includes any other remuneration for services under a plan, method, or arrangement deferring the receipt of compensation to a date that is after the 15th day of the 3rd calendar month after the end of the entity's taxable year in which the related services are rendered. However, synthetic equity does not include benefits under a plan that is an eligible retirement plan within the meaning of section 402(c)(8)(B).

(B) For purposes of applying paragraph (f)(2)(iv)(A) of this section with respect to an ESOP, synthetic equity does not include any interest described in such paragraph (f)(2)(iv)(A) of this section to the extent that—

(1) The interest is nonqualified deferred compensation (within the meaning of section 3121(v)(2)) that was outstanding on December 17, 2004;

(2) The interest is an amount that was taken into account (within the meaning of § 31.3121(v)(2)-1(d) of this chapter) prior to January 1, 2005, for purposes of taxation under chapter 21 of the Internal Revenue Code (or income attributable thereto); and

(3) The interest was held before the first date on which the ESOP acquires any employer securities.

(v) *No overlap among shares of deemed-owned ESOP shares or synthetic equity.* Synthetic equity under this paragraph

(f)(2) does not include shares that are deemed-owned ESOP shares (or any rights with respect to deemed-owned ESOP shares to the extent such rights are specifically provided under section 409(h)). In addition, synthetic equity under a specific subparagraph of this paragraph (f)(2) does not include anything that is synthetic equity under a preceding provision of paragraph (f)(2)(i), (ii), (iii), or (iv) of this section.

(3) *Related entity.* For purposes of this paragraph (f), *related entity* means any entity in which the S corporation holds an interest and which is a partnership, a trust, an eligible entity that is disregarded as an entity that is separate from its owner under §301.7701-3 of this chapter, or a qualified subchapter S subsidiary under section 1361(b)(3).

(4) *Number of synthetic shares—(i) Synthetic equity determined by reference to S corporation shares.* In the case of synthetic equity that is determined by reference to shares of stock of the S corporation, the person who is entitled to the synthetic equity is treated as owning the number of shares of stock deliverable pursuant to such synthetic equity. In the case of synthetic equity that is determined by reference to shares of stock of the S corporation, but for which payment is made in cash or other property (besides stock of the S corporation), the number of shares of synthetic equity treated as owned is equal to the number of shares of stock having a fair market value equal to the cash or other property (disregarding lapse restrictions as described in §1.83-3(i)). Where such synthetic equity is a right to purchase or receive S corporation shares, the corresponding number of shares of synthetic equity is determined without regard to lapse restrictions as described in §1.83-3(i) or to any amount required to be paid in exchange for the shares. Thus, for example, if a corporation grants an employee of an S corporation an option to purchase 100 shares of the corporation's stock, exercisable in the future only after the satisfaction of certain performance conditions, the employee is the deemed owner of 100 synthetic equity shares of the corporation as of the date the option is granted. If the same employee were granted 100 shares of restricted S corporation stock (or restricted stock

units), subject to forfeiture until the satisfaction of performance or service conditions, the employee would likewise be the deemed owner of 100 synthetic equity shares from the grant date. However, if the same employee were granted a stock appreciation right with regard to 100 shares of S corporation stock (whether payable in stock or in cash), the number of synthetic equity shares the employee is deemed to own equals the number of shares having a value equal to the appreciation at the time of measurement (determined without regard to lapse restrictions).

(ii) *Synthetic equity determined by reference to shares in a related entity.* In the case of synthetic equity that is determined by reference to shares of stock (or similar interests) in a related entity, the person who is entitled to the synthetic equity is treated as owning shares of stock of the S corporation with the same aggregate value as the number of shares of stock (or similar interests) of the related entity (with such value determined without regard to any lapse restriction as defined at §1.83-3(i)).

(iii) *Other synthetic equity—(A) General rule.* In the case of any synthetic equity to which neither paragraph (f)(4)(i) of this section nor paragraph (f)(4)(ii) of this section apply, the person who is entitled to the synthetic equity is treated as owning on any date a number of shares of stock in the S corporation equal to the present value (on that date) of the synthetic equity (with such value determined without regard to any lapse restriction as defined at §1.83-3(i)) divided by the fair market value of a share of the S corporation's stock as of that date.

(B) *Use of annual or more frequent determination dates.* A year is a nonallocation year if the thresholds in paragraph (c) of this section are met at any time during that year. However, for purposes of this paragraph (f)(4)(iii), an ESOP may provide that the number of shares of S corporation stock treated as owned by a person who is entitled to synthetic equity to which this paragraph (f)(4)(iii) applies is determined annually (or more frequently), as of the first day of the ESOP's plan year or as of any other reasonable determination

date or dates during a plan year. If the ESOP so provides, the number of shares of synthetic equity to which this paragraph (f)(4)(iii) applies that are treated as owned by that person for any period from a given determination date through the date immediately preceding the next following determination date is the number of shares treated as owned on the given determination date.

(C) *Use of triennial recalculations.* (1) Although an ESOP must have a determination date that is no less frequent than annually, if the terms of the ESOP so provide, then the number of shares of synthetic equity with respect to grants of synthetic equity to which this paragraph (f)(4)(iii) applies may be fixed for a specified period from a determination date identified under the ESOP through the day before a determination date that is not later than the third anniversary of the identified determination date. Thus, the ESOP must provide for the number of shares of synthetic equity to which this paragraph (f)(4)(iii) applies to be re-determined not less frequently than every three years, based on the S corporation share value on a determination date that is not later than the third anniversary of the identified determination date and the aggregate present value of the synthetic equity to which this paragraph (f)(4)(iii) applies (including all grants made during the three-year period) on that determination date.

(2) However, additional accruals, allocations, or grants (to which this paragraph (f)(4)(iii) applies) that are made during such three-year period are taken into account on each determination date during that period, based on the number of synthetic equity shares resulting from the additional accrual, allocation, or grant (determined as of the determination date on or next following the date of the accrual, allocation, or grant). See *Example 3* of paragraph (h) of this section for an example illustrating this paragraph (f)(4)(iii)(C).

(3) If, as permitted under this paragraph (f)(4)(iii)(C), an ESOP provides for the number of shares of synthetic equity to be fixed for a specified period from a determination date to a subsequent determination date, then that subsequent determination date can be

changed to a new determination date, subject to the following conditions:

(i) The change in the subsequent determination date must be effectuated through a plan amendment adopted before the new determination date;

(ii) The new determination date must be earlier than the prior determination date (that is, the new determination date must be earlier than the determination date applicable in the absence of the plan amendment);

(iii) The conditions in paragraph (f)(4)(iii)(C)(2) of this section must be satisfied measured from the new determination date; and

(iv) Except to the extent permitted by the Commissioner in revenue rulings, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b) of this chapter), the change must be adopted in connection with either a change in the plan year of the ESOP or a merger, consolidation, or transfer of plan assets of the ESOP under section 414(1) (and the new determination date must consistent with that plan year change or section 414(1) event).

(4) *Conditions for application of rules.* This paragraph (f)(4)(iii)(C) only applies with respect to grants of synthetic equity to which this paragraph (f)(4)(iii) applies. In addition, paragraph (f)(4)(iii)(C) of this section applies only if the fair market value of a share of the S corporation securities on any determination date is not unrepresentative of the value of the S corporation securities throughout the rest of the plan year and only if the terms of the ESOP include provisions conforming to paragraph (f)(4)(iii)(C)(1) of this section which are consistently used by the ESOP for all persons. In addition, paragraph (f)(4)(iii)(C)(1) of this section applies only if the terms of the ESOP include provisions conforming to paragraphs (f)(4)(iii)(C)(1) of this section which are consistently used by the ESOP for all persons.

(iv) *Adjustment of number of synthetic equity shares where ESOP owns less than 100 percent of S corporation.* The number of synthetic shares otherwise determined under this paragraph (f)(4) is decreased ratably to the extent that shares of the S corporation are owned by a person who is not an ESOP and

who is subject to Federal income taxes. For example, if an S corporation has 200 outstanding shares, of which individual A owns 50 shares and the ESOP owns the other 150 shares, and individual B would be treated under this paragraph (f)(4) as owning 100 synthetic equity shares of the S corporation but for this paragraph (f)(4)(iv), then, under the rule of this paragraph (f)(4)(iv), the number of synthetic shares treated as owned by B under this paragraph (f)(4) is decreased from 100 to 75 (because the ESOP only owns 75 percent of the outstanding stock of the S corporation, rather than 100 percent).

(v) *Special rule for shares with greater voting power than ESOP shares.* Notwithstanding any other provision of this paragraph (f)(4), if a synthetic equity right includes (directly or indirectly) a right to purchase or receive shares of S corporation stock that have per-share voting rights greater than the per-share voting rights of one or more shares of S corporation stock held by the ESOP, then the number of shares of deemed owned synthetic equity attributable to such right is not less than the number of shares that would have the same voting rights if the shares had the same per-share voting rights as shares held by the ESOP with the least voting rights. For example, if shares of S corporation stock held by the ESOP have one voting right per share, then an individual who holds an option to purchase one share with 100 voting rights is treated as owning 100 shares of synthetic equity.

(g) *Avoidance or evasion of section 409(p) involving synthetic equity—(1) General rule.* Paragraph (g)(2) of this section sets forth a standard for determining whether the principal purpose of the ownership structure of an S corporation involving synthetic equity constitutes an avoidance or evasion of section 409(p). Paragraph (g)(3) of this section identifies certain specific ownership structures that constitute an avoidance or evasion of section 409(p). See also paragraph (c)(3) of this section for a rule under which the ownership structures in paragraph (g)(3) of this section result in a nonallocation year for purposes of section 409(p).

(2) *Standard for determining when there is an avoidance or evasion of section*

409(p) involving synthetic equity. For purposes of section 409(p) and this section, whether the principal purpose of the ownership structure of an S corporation involving synthetic equity constitutes an avoidance or evasion of section 409(p) is determined by taking into account all the surrounding facts and circumstances, including all features of the ownership of the S corporation's outstanding stock and related obligations (including synthetic equity), any shareholders who are taxable entities, and the cash distributions made to shareholders, to determine whether, to the extent of the ESOP's stock ownership, the ESOP receives the economic benefits of ownership in the S corporation that occur during the period that stock of the S corporation is owned by the ESOP. Among the factors indicating that the ESOP receives those economic benefits include shareholder voting rights, the right to receive distributions made to shareholders, and the right to benefit from the profits earned by the S corporation, including the extent to which actual distributions of profits are made from the S corporation to the ESOP and the extent to which the ESOP's ownership interest in undistributed profits and future profits is subject to dilution as a result of synthetic equity. For example, the ESOP's ownership interest is not subject to dilution if the total amount of synthetic equity is a relatively small portion of the total number of shares and deemed-owned shares of the S corporation.

(3) *Specific transactions that constitute an avoidance or evasion of section 409(p) involving segregated profits.* Taking into account the standard in paragraph (g)(2) of this section, the principal purpose of the ownership structure of an S corporation constitutes an avoidance or evasion of section 409(p) in any case in which—

(i) The profits of the S corporation generated by the business activities of a specific individual or individuals are not provided to the ESOP, but are instead substantially accumulated and held for the benefit of the individual or individuals on a tax-deferred basis within an entity related to the S corporation, such as a partnership, trust, or corporation (such as in a subsidiary

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that is a disregarded entity), or any other method that has the same effect of segregating profits for the benefit of such individual or individuals (such as nonqualified deferred compensation described in paragraph (f)(2)(iv) of this section);

(ii) The individual or individuals for whom profits are segregated have rights to acquire 50 percent or more of those profits directly or indirectly (for example, by purchase of the subsidiary); and

(iii) A nonallocation year would occur if this section were separately applied with respect to either the separate entity or whatever method has the effect of segregating profits of the individual or individuals, treating such entity as a separate S corporation owned by an ESOP (or in the case of any other method of segregation of profits by

treating those profits as the only assets of a separate S corporation owned by an ESOP).

(h) *Examples.* The rules of this section are illustrated by the following examples:

Example 1. Relating to determination of disqualified persons and nonallocation year if there is no synthetic equity. (i) *Facts.* Corporation X is a calendar year S corporation that maintains an ESOP. X has a single class of common stock, of which there are a total of 1,200 shares outstanding. X has no synthetic equity. In 2006, individual A, who is not an employee of X (and is not related to any employee of X), owns 100 shares directly, B, who is an employee of X, owns 100 shares directly, and the remaining 1,000 shares are owned by an ESOP maintained by X for its employees. The ESOP's 1,000 shares are allocated to the accounts of individuals who are employees of X (none of whom are related), as set forth in columns 1 and 2 in the following table:

1 Shareholders	2	3	4
	Deemed-owned ESOP shares (total of 1,000)	Percentage deemed-owned ESOP shares	Disqualified person
B	330	33	Yes.
C	145	14.5	Yes.
D	75	7.5	No.
E	30	3	No.
F	20	2	No.
Other participants	¹ 400	(²)	No.

¹ None exceed 10 shares.
² 1% or less.

(ii) *Conclusion with respect to disqualified persons.* As shown in column 4 in the table contained in paragraph (i) of *Example 1*, individuals B and C are disqualified persons for 2006 under paragraph (d)(1) of this section because each owns at least 10% of X's deemed-owned ESOP shares. However, the synthetic equity shares owned by any person do not affect the calculation for any other person's ownership of shares.

(iii) *Conclusion with respect to nonallocation year.* 2006 is not a nonallocation year under section 409(p) because disqualified persons do not own at least 50% of X's outstanding

shares (the 100 shares owned directly by B, B's 330 deemed-owned ESOP shares, plus C's 145 deemed-owned ESOP shares equal only 47.9% of the 1,200 outstanding shares of X).

Example 2. Relating to determination of disqualified persons and nonallocation year if there is synthetic equity. (i) *Facts.* The facts are the same as in *Example 1*, except that, as shown in column 4 of the table in this *Example 2*, individuals E and F have options to acquire 110 and 130 shares, respectively, of the common stock of X from X:

1 Shareholder	2 Deemed-owned ESOP shares (total of 1,000)	3 Percentage deemed-owned ESOP shares	4 Options (240)	5 Shareholder percentage of deemed-owned ESOP plus synthetic equity shares	6 Disqualified person
B	330	33	.....	.....	Yes (col. 3).
C	145	14.5	.....	.....	Yes (col. 3).
D	75	7.5	.....	.....	No.
E	30	3	110	11.1% [(30+ 91.7) divided by 1,091.7].	Yes (col. 5).
F	20	2	130	11.6% [(20 +108.3) divided by 1,108.3].	Yes (col. 5).

1 Shareholder	2 Deemed- owned ESOP shares (total of 1,000)	3 Percentage deemed- owned ESOP shares	4 Options (240)	5 Shareholder percentage of deemed-owned ESOP plus synthetic eq- uity shares	6 Disqualified person
Other participants	1 400	(²)	.....	.....	No.

¹ None exceeds 10 shares.
² 1% or less.

(ii) *Conclusion with respect to disqualified persons.* Individual E's synthetic equity shares are counted in determining whether E is a disqualified person for 2006, and individual F's synthetic equity shares are counted in determining whether F is a disqualified person for 2006. Applying the rule of paragraph (f)(4)(iv) of this section, E's option to acquire 110 shares of the S corporation converts under paragraph (f)(4)(iv) of this section, into 91.7 shares of synthetic equity (110 times the ratio of the 1,000 deemed-owned ESOP shares to the sum of the 1,000 deemed-owned ESOP shares plus the 200 shares held outside the ESOP by A and B). Similarly, F's option to acquire 130 shares of the S corporation converts into 108.3 shares of synthetic equity (130 times the ratio of the 1,000 deemed-owned ESOP shares to the sum of the 1,000 deemed-owned ESOP shares plus the 200 shares held outside the ESOP by A and B). However, the synthetic equity shares owned by any person do not affect the calculation for any other person's ownership of shares. Accordingly, as shown in column 6 in the table contained in paragraph (i) of *Example 2*, individuals B, C, E, and F are disqualified persons for 2006.

(iii) *Conclusion with respect to nonallocation year.* The 100 shares owned directly by B, B's 330 deemed-owned ESOP shares, C's 145 deemed-owned ESOP shares, E's 30 deemed-owned ESOP shares, E's 91.7 synthetic equity shares, F's 20 deemed-owned ESOP shares, plus F's 108.3 synthetic equity shares total 825, which equals 58.9% of 1,400, which is the sum of the 1,200 outstanding shares of X and

the 200 shares of synthetic equity shares of X held by disqualified persons. Thus, 2006 is a nonallocation year for X's ESOP under section 409(p) because disqualified persons own at least 50% of the total shares of outstanding stock of X and the total synthetic equity shares of X held by disqualified persons. In addition, independent of the preceding conclusion, 2006 would be a nonallocation year because disqualified persons own at least 50% of X's outstanding shares because the 100 shares owned directly by B, B's 330 deemed-owned ESOP shares, C's 145 deemed-owned ESOP shares, E's 30 deemed-owned ESOP shares, plus F's 20 deemed-owned ESOP shares equal 52.1% of the 1,200 outstanding shares of X.

Example 3. Relating to determination of number of shares of synthetic equity. (i) *Facts.* Corporation Y is a calendar year S corporation that maintains an ESOP. Y has a single class of common stock, of which there are a total of 1,000 shares outstanding, all of which are owned by the ESOP. Y has no synthetic equity, except for four grants of nonqualified deferred compensation that are made to an individual during the period from 2005 through 2011, as set forth in column 2 in the following table. The ESOP provides for the special rules in paragraph (f)(4)(iii) of this section to determine the number of shares of synthetic equity owned by that individual with a determination date of January 1 and the triennial rule redetermining value, as shown in columns 4 and 5:

1	2	3	4	5
Determination date	Present value of nonqualified deferred compensation on determination date	Share value on determination date	New shares of synthetic equity on determination date	Aggregate number of synthetic equity shares on determination date
January 1, 2005 ...	A grant is made on January 1, 2005, with a present value of \$1,000. An additional grant of nonqualified deferred compensation with a present value of \$775 is made on March 1, 2005.	\$10 per share	100	100
January 1, 2006 ...	An additional grant is made on December 31, 2005, which has a present value of \$800 on January 1, 2006. The March 1, 2005, grant has a present value on January 1, 2006, of \$800.	\$8 per share	200	300
January 1, 2007 ...	No new grants made	\$12 per share	300

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1	2	3	4	5
Determination date	Present value of nonqualified deferred compensation on determination date	Share value on determination date	New shares of synthetic equity on determination date	Aggregate number of synthetic equity shares on determination date
January 1, 2008 ...	An additional grant is made on December 31, 2007, which has a present value of \$3,000 on January 1, 2008. The grants made during 2005 through 2007 have an aggregate present value on January 1, 2008, of \$3,750.	\$15 per share	200	450
January 1, 2009 ...	No new grants are made	\$11 per share .....	.....	450
January 1, 2010 ...	No new grants are made	\$22 per share .....	.....	450
January 1, 2011 ...	No new grants are made. The grants made during 2005 through 2008 have an aggregate present value on January 1, 2011, of \$7,600.	\$20 per share .....	.....	380

(ii) *Conclusion.* The grant made on January 1, 2005, is treated as 100 shares until the determination date in 2008. The grant made on March 1, 2005, is not taken into account until the 2006 determination date and its present value on that date, along with the then present value of the grant made on December 31, 2005, is treated as a number of shares that are based on the \$8 per share value on the 2006 determination date, with the resulting number of shares continuing to apply until the determination date in 2008. On the January 1, 2008, determination date, the grant made on the preceding day is taken into account at its present value of \$3,000 on January 1, 2008 and the \$15 per share value on that date with the resulting number of shares (200) continuing to apply until the next determination date. In addition, on the January 1, 2008, determination date, the number of shares determined under other grants made between January 1, 2005 and December 31, 2007, must be revalued. Accordingly, the aggregate value of all nonqualified deferred compensation granted during that period is determined to be \$3750 on January 1, 2008, and the corresponding number of shares of synthetic equity based on the \$15 per share value is determined to be 250 shares on the 2008 determination date, with the resulting aggregate number of shares (450) continuing to apply until the determination date in 2011. On the January 1, 2011, determination date, the aggregate value of all nonqualified deferred compensation is determined to be \$7,600 and the corresponding number of shares of synthetic equity based on the \$20 per share value on the 2011 determination date is determined to be 380 shares (with the resulting number of shares continuing to apply until the day before the determination date in 2014, assuming no further grants are made).

(i) *Effective dates—(1) Statutory effective date.* (i) Except as otherwise provided in paragraph (i)(1)(ii) of this sec-

tion, section 409(p) applies for plan years ending after March 14, 2001.

(ii) If an ESOP holding stock in an S corporation was established on or before March 14, 2001, and the election under section 1362(a) with respect to that S corporation was in effect on March 14, 2001, section 409(p) applies for plan years beginning on or after January 1, 2005.

(2) *Regulatory effective date.* This section applies for plan years beginning on or after January 1, 2006. For plan years beginning before January 1, 2006, § 1.409(p)-1T (as it appeared in the April 1, 2005, edition of 26 CFR part 1) applies.

[T.D. 9302, 71 FR 76137, Dec. 20, 2006]

§ 1.409(p)-1T Prohibited allocations of securities in an S corporation (temporary).

(a) *Organization of this section.* Section 409(p) applies if a nonallocation year occurs in an employee stock ownership plan (ESOP), as defined in section 4975(e)(7), that holds shares of stock of an S corporation, as defined in section 1361, that are employer securities as defined in section 409(1). Paragraph (b) of this section sets forth the general rule under section 409(p)(1) and (2) prohibiting any accrual or allocation to a disqualified person in a nonallocation year. Paragraph (c) of this section sets forth rules under section 409(p)(3), (5), and (7) for determining whether a year is a nonallocation year, generally based on whether disqualified persons own at least 50 percent of the shares of the S corporation, either taking into account only the outstanding